

## Surface Transportation Board, DOT

## §1144.1

Government having a duration of 91 days (3 months). The rate levels will be determined as follows:

(1) For investigation proceedings, the interest rate shall be the coupon equivalent yield in effect on the date the statement is filed accounting for all amounts received under the new rates (See 49 U.S.C. 10707(d)(1)).

(2) For complaint proceedings, the interest rate shall be the coupon equivalent yield in effect on the first day of the calendar quarter in which an unlawful charge is paid. The interest rate in complaint proceedings shall be updated as of the first day of all subsequent calendar quarters, at the coupon equivalent yields in effect on those days. Updating will continue until the required reparation payments are made.

(3) For purposes of this section, coupon equivalent yields shall be considered "in effect" on the date the securities are issued, not on the date they are auctioned. If the date the statement is filed (for investigation proceedings) or if the first day of the calendar quarter (for complaint proceedings) is the same as the issue date, then the yield on that date shall be used.

(b) Interest in a complaint or investigation proceeding shall be compounded quarterly, as follows:

(1) For investigation proceedings, the reparations period shall begin on the date the investigation is started. Thus, unless by coincidence, the quarterly compounding periods in investigation proceedings will not coincide with the calendar quarters.

(2) For complaint proceedings, the reparations period shall begin on the date the unlawful charge is paid. However, in order for the quarterly compounding periods in complaint cases to coincide with the calendar quarters (so that only one interest rate is in effect during each compounding period), the first compounding period shall run from the date the unlawful charge is paid to the last day of the current calendar quarter, and all subsequent compounding periods shall coincide with the calendar quarters.

(3) For both investigation and complaint proceedings, the annual effective interest rate shall be the same as the

annual nominal (or stated) rate. Thus, the nominal rate must be factored exponentially to the power representing the portion of the year covered by the interest rate. A simple multiplication of the nominal rate by the portion of the year covered by the interest rate would not be appropriate because it would result in an effective rate in excess of the nominal rate. Under this "exponential" approach, the total cumulative reparations payment (including interest) is calculated by multiplying the interest factor for each quarterly period (or part thereof) by the principal amount for that period plus any accumulated interest from previous periods. The "interest factor" for each period is 1.0 plus the interest rate for that period to the power representing the portion of the year covered by the interest rate. As an example, if the annual interest rate for the quarter is 5.6 percent, then the interest factor would be 1.01368, or 1.056 to the power of 91/365.

[58 FR 19360, Apr. 14, 1993]

## PART 1144—INTRAMODAL RAIL COMPETITION

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AUTHORITY: 49 U.S.C. 721, 10703, 10705, and 11102.

SOURCE: 50 FR 46066, Nov. 6, 1985, unless otherwise noted.

### §1144.1 Notification, explanation, and justification.

(a) *Notification.* A rail carrier proposing to cancel a through route and/or a joint rate shall comply with the requirements of 49 U.S.C. 10762(c)(3) and 10705a(f), as appropriate, and 49 CFR part 1312, and shall give notice of its intent to make such a cancellation 45 days prior to the effective date of the cancellation. For cancellations under 49 U.S.C. 10705(e), the 45-day period must consist of at least a 25-day notice of intent to file followed by a 20-day

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tariff filing in compliance with 49 U.S.C. 10762(c)(3).

(b) *Explanation and justification*—(1) *Request.* After a rail carrier has given notice of a proposed cancellation, any affected party may ask the canceling rail carrier to:

(i) Explain how the proposed cancellation will affect the party, and

(ii) Justify the application of the cancellation to a route or rate actively used by or participated in by the party.

(2) *Reply.* The rail carrier proposing the cancellation must give the party the requested explanation and justification, including pertinent mileage and cost data, within 10 days of the date the request is made.

(3) *Time.* By mutual agreement, the rail carrier proposing the cancellation and the affected party may alter the time frames of paragraph (b)(2) of this section. The 49 CFR part 1132 time periods for protests and replies apply.

(4) *Content.* The content of the request and reply (other than pertinent mileage and cost data) will be left to the parties, though all information pertinent to the individual case should be included. The failure to provide information necessary to analyze the action under the criteria established in §1144.3 may be treated as an admission against interest.

[50 FR 46066, Nov. 6, 1985; 51 FR 18333, May 19, 1986; 56 FR 18532, Apr. 23, 1991]

## §1144.2 Negotiation.

(a) *Timing.* At least 5 days prior to challenging a cancellation of a through route or joint rate, or seeking the prescription of a through route, joint rate, or reciprocal switching, the party intending to initiate such action must first seek to engage in negotiations to resolve its dispute with the prospective defendants.

(b) *Participation.* Participation or failure to participate in negotiations does not waive a party's right to file a timely request for suspension and/or investigation or prescription.

(c) *Arbitration.* The parties may use arbitration as part of the negotiation process, or in lieu of litigation before the Board.

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## §1144.3 Suspension.

(a) *General.* Under these rules the Board will suspend and investigate, investigate, or not suspend and investigate a proposed cancellation of a through route and/or joint rate. A persuasive presentation under all of the criteria below is sufficient for the Board to determine that the requirements of 49 U.S.C. 10707(c)(1) have been met warranting suspension and investigation of the proposed cancellation. Failure to convince the Board on any one of the criteria may result in either only an investigation (no suspension) or a determination not to investigate. This will be decided on a case-by case basis.

(b) *Statutory factors.* A decision under (a) will be made based on the broad factors in 49 U.S.C. 10707(c)(1). The criteria considered in analyzing the factors in 49 U.S.C. 10707(c)(1) (A and B) are in paragraph (c) of this section. The requirements to keep account under 49 U.S.C. 10707(c)(1)(C) cannot be applied to cancellation cases, and will not be considered.

(c) *Criteria.* The Board will suspend and investigate if a protestant shows:

(1) The cancellations of a through route and/or joint rate would eliminate effective railroad competition for the affected traffic between the origin and destination. Among other evidence, the Board will consider two rebuttable presumptions to show the elimination of effective railroad competition: (i) That the mileage between the origin and destination over the route to be canceled is not more than that of any feasible alternative rail route; and (ii) that the cost of operating via the route to be canceled is not more than that of any feasible alternative rail route; and

(2) Either (i) a protesting shipper has used or would use the through route and/or joint rate proposed to be canceled to meet a significant portion of its current or future railroad transportation needs between the origin and destination; or

(ii) A protesting carrier has used or would use the affected through route and/or joint rate for a significant amount of traffic.

**§1144.4 Investigation of proposed cancellations.**

(a) *General.* The Board shall determine that a proposed cancellation of a through route and/or joint rate is contrary to the public interest under 49 U.S.C. 10705 if it finds that the cancellation, or a rate that would remain in place after the cancellation, is contrary to the competition policies of 49 U.S.C. 10101a or is otherwise anticompetitive.

(b) *Factors.* In making its determination, the Board will take into account all relevant factors, including:

(1) The revenues of the involved railroads on the affected traffic via the rail routes in question.

(2) The efficiency of the rail routes in question, including the costs of operating via those routes.

(3) The rates charged or sought to be charged by the canceling railroad or railroads.

(4) The revenues, following the cancellation, of the involved railroads for the traffic in question via the affected through route; the costs of the involved railroads for that traffic via that route; the ratios of those revenues to those costs; and all circumstances relevant to any difference in those ratios; provided that the mere loss of revenue to an affected carrier will not be a basis for finding that a cancellation is anticompetitive.

(c) *Other considerations.* (1) The Board will not consider product competition.

(2) If a railroad wishes to rely in any way on geographic competition, it will have the burden of proving the existence of effective geographic competition by clear and convincing evidence.

(3) Where a cancellation has been determined to be contrary to the competitive standards of this section, the overall revenue inadequacy of the canceling carrier will not excuse such a cancellation.

(4) Any investigations of proposed cancellations under the terms of this paragraph will be conducted and concluded by the Board on an expedited basis.

**§1144.5 Prescription.**

(a) *General.* A through route or a through rate shall be prescribed under 49 U.S.C. 10705, or a switching arrange-

ment shall be established under 49 U.S.C. 11103, if the Board determines:

(1) That the prescription or establishment (i) is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101a or is otherwise anticompetitive, and (ii) otherwise satisfies the criteria of 49 U.S.C. 10705 and 11103, as appropriate. In making its determination, the Board shall take into account all relevant factors, including:

(A) The revenues of the involved railroads on the affected traffic via the rail routes in question.

(B) The efficiency of the rail routes in question, including the costs of operating via those routes.

(C) The rates or compensation charged or sought to be charged by the railroad or railroads from which prescription or establishment is sought.

(D) The revenues, following the prescription, of the involved railroads for the traffic in question via the affected route; the costs of the involved railroads for that traffic via that route; the ratios of those revenues to those costs; and all circumstances relevant to any difference in those ratios; provided that the mere loss of revenue to an affected carrier shall not be a basis for finding that a prescription or establishment is necessary to remedy or prevent an act contrary to the competitive standards of this section; and

(2) That either:

(i) The complaining shipper has used or would use the through route, through rate, or reciprocal switching to meet a significant portion of its current or future railroad transportation needs between the origin and destination; or

(ii) The complaining carrier has used or would use the affected through route, through rate, or reciprocal switching for a significant amount of traffic.

(b) *Other considerations.* (1) The Board will not consider product competition.

(2) If a railroad wishes to rely in any way on geographic competition, it will have the burden of proving the existence of effective geographic competition by clear and convincing evidence.

(3) When prescription of a through route, a through rate, or reciprocal switching is necessary to remedy or

prevent an act contrary to the competitive standards of this section, the overall revenue inadequacy of the defendant railroad(s) will not be a basis for denying the prescription.

(4) Any proceeding under the terms of this section will be conducted and concluded by the Board on an expedited basis.

**§1144.6 General.**

(a) These rules will govern the Board's adjudication of individual cases pending on or after the effective date of these rules (October 31, 1985).

(b) These rules supersede the rules at 49 CFR part 1132 to the extent they are inconsistent.

(c) Discovery under these rules is governed by the Board's general rules of discovery at 49 CFR part 1114.

(d) Any Board determinations or findings under this part with respect to compliance or non-compliance with the standards of §§1144.4 and 1144.5 shall not be given any *res judicata* or collateral estoppel effect in any litigation involving the same facts or controversy arising under the antitrust laws of the United States.

**PART 1146—EXPEDITED RELIEF FOR SERVICE EMERGENCIES**

AUTHORITY: 49 U.S.C. 721, 11101, and 11123.

**§ 1146.1 Prescription of alternative rail service.**

(a) *General.* Alternative rail service will be prescribed under 49 U.S.C. 11123(a) if the Board determines that, over an identified period of time, there has been a substantial, measurable deterioration or other demonstrated inadequacy in rail service provided by the incumbent carrier.

(b)(1) *Petition for Relief.* Affected shippers or railroads may seek the relief described in paragraph (a) of this section by filing an appropriate petition containing:

(i) A full explanation, together with all supporting evidence, to demonstrate that the standard for relief contained in paragraph (a) of this section is met;

(ii) A summary of the petitioner's discussions with the incumbent carrier

of the service problems and the reasons why the incumbent carrier is unlikely to restore adequate rail service consistent with current transportation needs within a reasonable period of time;

(iii) A commitment from another available railroad to provide alternative service that would meet current transportation needs (or, if the petitioner is a railroad and does not have an agreement from the alternative carrier, an explanation as to why it does not), and an explanation of how the alternative service would be provided safely without degrading service to the existing customers of the alternative carrier and without unreasonably interfering with the incumbent's overall ability to provide service; and

(iv) A certification of service of the petition, by hand or by overnight delivery, on the incumbent carrier, the proposed alternative carrier, and the Federal Railroad Administration.

(2) *Reply.* The incumbent carrier must file a reply to a petition under this paragraph within five (5) business days.

(3) *Rebuttal.* The party requesting relief may file rebuttal no more than three (3) business days later.

(c) *Presumption of continuing need.* Unless otherwise indicated in the Board's order, a Board order issued under paragraph (a) of this section shall establish a rebuttable presumption that the transportation emergency will continue for more than 30 days from the date of that order.

(d)(1) *Petition to terminate relief.* Should the Board prescribe alternative rail service under paragraph (a), of this section the incumbent carrier may subsequently file a petition to terminate that relief. Such a petition shall contain a full explanation, together with all supporting evidence, to demonstrate that the carrier is providing, or is prepared to provide, adequate service. Carrier are admonished not to file such a petition prematurely.

(2) *Reply.* Parties must file replies to petitions to terminate filed under this subsection within five (5) business days.

(3) *Rebuttal.* The incumbent carrier may file any rebuttal no more than three (3) business days later.